92-742

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No. _____

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1992

ARTHUR S. CURTIS,

Petitioner

vs.

THE ALUMINUM ASSOCIATION, INC.

AND

WOLF LENKIN LIMITED PARTNERSHIP

Respondents

PETITION FOR A WRIT OF CERTIORARI

TO THE DISTRICT OF COLUMBIA COURT OF APPEALS

ARTHUR S. CURTIS,
A Member of the Bar of this Court
acting PRO SE
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QUESTIONS PRESENTED

1. Nationwide, federal and state court systems occupy the same geographical space. Should there be a mandatory standard that courts in such sister jurisdictions should apply as to litigants who in good faith and without fault have selected one jurisdiction and then are told by the court selected that it is not the correct one, and who then wish to file in the sister court jurisdiction? Can, and should this Court in a few sentences clarify the relationship between them as to the jurisdictional problems and thereby provide justice to litigants who otherwise would lose their rights to a forum? Petitioner proposes one solution near the end of this Petition. Although this Petition deals with the problem in the District of Columbia, it presents a case study as to why action is required by this Court in the nationwide interests of justice.

2. Should this Court provide leadership as to comity of courts in the

District of Columbia, where the two systems of courts coexist to the harm of litigants as shown by this case, as a matter of supervised justice for the users of both court systems?

3. Where a plaintiff without his fault, loses his forum in U.S.District Court, D.C. as a result of a U.S.Supreme Court case involving entirely different parties, issues, locations,etc., should said plaintiff have a right to a forum in the state court system , or a " default" federal forum?

4. Is the conduct of the District of Columbia Court of Appeals in the present case, in refusing equitable tolling of the statute of limitations to a party who is not at fault, and where the defendants have not been harmed by passage of time, and its adherence to a 1970 decision on grounds of stare decisis, such a departure from accepted legal standards of justice that this Court should exercise its authority to bring proper standards and guidance to the District of Columbia Court of Appeals?

LIST OF ALL PARTIES TO

PROCEEDINGS IN

THE DISTRICT OF COLUMBIA COURT OF APPEALS

The above caption to the case contains the names of all parties.

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CONSTITUTIONAL PROVISION

Article I, # 17

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D.C. CODE § 12 - 301 (3)

LEARNED TEXTS

Stern, Gressman, and Shapiro, SUPREME COURT PRACTICE, 6th Edition (1986)

PETITION FOR A WRIT OF CERTIORARI

OF PETITIONER ARTHUR. S. CURTIS

Petitioner Arthur S. Curtis, (hereinafter Curtis), a member of the Bar of this Court, hereby petitions this Court for a writ of certiorari to review the Order filed August 5,1992, by the District of Columbia Court of Appeals denying a petition for rehearing en banc. Chief Judge Rogers and Associate Judge Schwelb voted to grant rehearing en banc.

OPINIONS BELOW

JUDGE VON KANN, Superior Court for the District of Columbia, dismissed with prejudice, on grounds of the three year statute of limitations, D.C. Code #12-301 (3), the complaint filed by Curtis. The three judge panel hearing the appeal was in favor, two judges to one, (Chief Judge Judith Rogers and Associate Judge Schwelb for) of granting

equitable tolling but could not do so because of M.A.P. v. Ryan 285 A. 2d 310 (1970), which held that no panel could overrule another panel's decision without first going through an en banc decision. The Opinion of Chief Judge Judith Rogers, supported by Associate Judge Schwelb, appears in the Appendix. In an Order filed August 5, 1992, the District of Columbia Court of Appeals denied Curtis' petition for rehearing en banc, with Chief Judge Judith Rogers and Associate Judge Schwelb dissenting. The Order states that Chief Judge Rogers and Associate Judge Schwelb voted to grant rehearing en banc. This Order is found in the Appendix.

JURISDICTION

Jurisdiction of this Court is invoked under the provisions of 28 U.S.C. 1257 (3).

This Petition is being filed within 90 days of the decision of the Court of Appeals for the District of Columbia, acting en banc, which was filed August 5, 1992, which denied Curtis's (Appellant, there) petition for rehearing or rehearing en banc.

STATEMENT OF THE CASE

In a tragic sense, it is fitting that this case come here for help, since the ailment which it bears originated in a decision of this Court, CARDEN V. ARKOMA ASSOCIATES, 110 S.CT. 1015 (1990), when in a 5 to 4 decision, the concept of citizen in a diversity case was stated so as change the working definition in some jurisdictions including the District of Columbia, of a limited partner. Judge Penn , U.S.D.C.D.C., who was hearing the original case, filed November 3, 1989, eventually on April 10, 1991, based upon an affidavit of a limited partner (who was not permitted to be subpoenaed for deposition), threw out the case both as to the allegedly non diverse party (Wolf-Lenkin Limited Partnership) but also as to the party about whom diversity was never questioned (Aluminum Association ,Inc.). There was no way of discovering that limited partner prior to filing the case. By date of CARDEN, the statute had run in the Superior Court of D.C. but there

was still no alarm; apparently none of the lawyers knew about CARDEN, and the judge did not raise CARDEN until the case was set for trial. By April 10, 1990, the Petitioner had filed his case in the Superior Court, D.C., with a statement that he was aware of the statute of limitations problem but praying that he be granted the right of equitable tolling for reason that he was an innocent victim . The law supporting Petitioner, a resident of Virginia, was Judge Harris' (U.S.D.C.D.C.) published opinion in Gordon Maizel Constr. Co. v. Leroy Prod. Inc., 643 F. Supp. 188 (1986) to the effect that when he filed the suit, under the published law of the forum only general partners were counted as citizens in D.C. because of the D.C. Limited Partnership Act which held that limited partners could not sue nor be sued except in very limited situations and thus were not citizens within the meaning of the constitution. Judge Harris quoted as authority, case law from the Second Circuit,

etc. The published law of the forum as found in the D.C. Limited Partnership Act and Judge Harris' published opinion in Gordon Maizel, (see Appendix) thus supported his choice of the U.S. District Court as his forum when he filed suit. Wolf-Lenkin was chartered as a limited partnership in D.C., had a place of business there, and had a registered agent in D.C. for purposes of accepting service. One general partner resided in D.C., the other resided in Maryland. Judge Von Kann, Superior Court, dismissed the case with prejudice upon grounds of statute of limitations. In the District of Columbia Court of Appeals, Chief Judge Rogers and Associate Judge Schwelb, sitting as part of a three judge panel, voted to grant equitable tolling, but could not do since M.A.P. v. Ryan, 285 A. 2d 310 (1970), court held that for a panel to overturn a holding of another panel such ruling must first be heard and approved by the court en banc. Chief Judge Rogers wrote a scholarly opinion, which was a

cry for justice through equitable tolling, which was presented by Petitioner as the bulk of his motion to be heard en banc, but a hearing was denied. The case now comes home to this Court, in the hope that a just solution will be found here.

More specifically, the water damage occurred in February 1987; the District of Columbia's Statute of Limitations for such cases, D.C. Code #12-301 (3), runs for three years; Curtis did not file until November 3, 1989 in U. S. District Court, D.C., in which court he was in time; his case was dismissed in that court on April 10,1991, but by then, on February 13, 1991 he had filed suit in the Superior Court to cover a possible dismissal in U.S.D.C., which actually came on April 10, 1991. If tacking is permitted, so that the time during which the case was in U.S.D.C.D.C. is added to the three years, then Curtis is in time; if tacking is not permitted, then unless equitable tolling is permitted, Curtis' case is dead,...

unless dismissal is overruled on other grounds such as fraudulent conduct by defendants which caused Curtis to delay his filing. On the last point, it is important that Curtis, within a few days of the damage, notified both Aluminum Association, Inc., from whom he sublet, and Wolf-Lenkin Limited Partnership, who owned the building. These defendants put Curtis in contact with their carriers, Travelers (Aluminum Association, Inc.) and Hartford (Wolf Lenkin Limited Partnership); both sent adjustors out to look at the premises, then delayed their responses, and also gave Curtis false information designed to prevent litigation, for example that the water damage was caused by the construction of the adjacent building; that the water damage was caused by a truck striking a water plug; that the engineer's log book was lost or else had been transferred to Cafritz Company, to whom the building was sold; that the books which were damaged were of no value; that the engravings were outdated and of no value.

With barely a suit to go on, Curtis filed his case and took discovery, spending thousands of dollars on depositions, payment of witnesses and out of town experts, which discovery proved that: From deposition of Kevin Dameron, building engineer at period of damage, that his daily log had been given to his superior who was to forward it to Hartford; that during George Washington's Birthday holiday in 1987, there was no employee on duty, and the heat was turned off, and that the water damage was caused by a pipe which froze and burst two floors up, sending water down the pipe to flood Curtis's damages, and that he had seen evidence of the water damage in Curtis' premises. Deposition of experts to prove damages included Tom Pritchard, Executive Editor of King Features Syndicate; and the owner of Mercury Engraving, also in New York city. King Features is the largest feature syndicate in the world and sells something to every newspaper in the free world; Mercury makes engravings for publications and others. Both

depositions were taken orally and by video in New York City. Mr. Pritchard testified that the damaged engravings were in effect valuable and should be usable (saleable) as the cycle of reader interest returned.

The engravings relate to stories of the Congressional Medal of Honor and are 189 illustrated stories of recipients, in third page newspaper size and also magazine format; they appeared in the Boston Globe, Pittsburgh Press, Seattle Times, Miami Herald, etc.from 1945-9 and periodically thereafter,and in magazine format; 61 of the third page four color engravings, and one magazine-book were made unusable by water damage. Cost of replacing the damaged engravings was estimated by Mercury at in excess of $60,000. The books which were damaged by water were paperback reproductions of the newspaper stories, and numbered ten cases of books or 1000 books; these books are being sold today at Arlington Cemetery Book store for $7.50 each and are entitled, GREATEST ARMY HEROES; GREATEST

NAVY HEROES; GREATEST AIR FORCE HEROES. The tactic of the carriers was therefore intentional deception to defeat a lawsuit instead of an honest appraisal of liability and damages, and should qualify for fraudulent conduct, so as to pose a jury question at trial. (The illustrated stories were conceived by Curtis while he taught at U.S.Naval Academy, Annapolis in 1944-5, were written and produced and marketed by him, and used various artists including Michael Arens, earlier with the Disney staff on Snow White and at his death chief layout artist of Hanna - Barbera Studios. Also, there were other elements of damage.) In Emmett v. Eastern Dispensary and Casualty Hospital, 396 F. 2d 931 (1967), at page 937, Judge Spottswood Robinson wrote:

" It has often been said that a primary purpose of statutes of limitation in general has been the prevention of fraud...the ancient maxim that no one should profit by his own conscious wrong is too deeply embedded in the legal

framework of our law to be set aside by legalistic distinction between closely related types of statutes of limitations... Moreover, in Holmberg v. Armbrecht, 327 U.S. 392, 396-7, 66 S.Ct. 582, 90 L. Ed 743 (1946) the Supreme Court declared that the doctrine of tolling by fraudulent concealment is read into every federal statute of limitation. "

REASONS FOR GRANTING THE WRIT

1.

THE SUPREME COURT HAS ADDRESSED THE PROBLEM OF STATUTE OF LIMITATIONS AND HAS FAVORED EQUITABLE TOLLING WHERE JUSTICE DEMANDS IT.

In Hanger v. Abbott, 6 Wall. 532, 18 L. Ed. 532 (1868) the Supreme Court held that the running of a statute may be suspended by causes not mentioned in the statute itself. In that case, the facts were that the civil war broke out, thus affecting commercial relationships. The Court held that war suspends the statute of limitations.

In Burnett v. New York Central R. Co., 380 U.S. 424, 85 S.Ct. 1050, 13 L. Ed. 2d 941 (1965), the Federal Employer's Liability Act was involved. Congress had placed a three year limit on filing suit, see # 6 of the Act. Suit was filed in an Ohio court and was dismissed for improper venue. Eight days later the plaintiff brought a similar suit in federal court and his case was again dismissed, this time on grounds that it was not timely. The Court of Appeals

affirmed. On certiorari, the Supreme Court, reversed. In an opinion by Mr. Justice Goldberg, the Supreme Court, expressing the views of seven members of the Court, held that the timely commencement of the state court action tolled the federal statute of limitations and further ruled that (1) the federal limitation provision was tolled until the state court order dismissing the state action became final by the running of the time during which an appeal may be taken or the entry of a final judgment on appeal. Mr. Justice Goldberg pointed out that statutes of limitations are primarily designed to assure fairness to defendants and to promote justice by preventing surprises through the revival of claims that have been allowed to slumber until evidence has been lost, memories have faded, and witnesses have disappeared; moreover the courts ought to be relieved of the burden of trying stale claims where a plaintiff has slept on his rights. However, Mr. Justice Goldberg also

pointed out that the policy of repose expressed in statutes of limitation is frequently outweighed where the interests of justice require vindication of the plaintiff's rights, as where a plaintiff has not slept on his rights but rather has been prevented from asserting them; and in such cases equitable tolling should be granted. Mr. Justice Goldberg further pointed out that the states had developed two methods for preserving causes of action which would otherwise be barred by the passing of a limitation period after a plaintiff had brought his suit in a court with improper venue. One method was to have a transfer of venue statute, and as of the date of the opinion 31 states had that; the other was a saving statute, and at the time of the opinion 31 stats had that. See lists on page 947, footnote 8, 13 L. Ed 2d. It appears that the District of Columbia has neither of these methods. Writing for seven members of this Court, Mr. Goldberg said, in reversing and remanding,

" Both federal and state jurisdictions have recognized the unfairness of barring a plaintiff's action solely because a prior timely action is dismissed for improper venue after the applicable statute of limitations has run. " See cases, P. 946ff.

In Bowen v. City of New York, 476 U.S. 467, 106 S. Ct. 2022, 90 L. Ed. 2d, 462 (1986), a class action was brought against Otis R. Bowen, Secretary of Health and Human Services et al, on behalf of social security claimants who did not timely file their claims or did not exhaust their administrative remedies. The federal judge found that the statute of limitations was not binding, he was upheld by the U.S. Court of Appeals, and certiorari was granted. Mr. Justice Powell, speaking for a unanimous Court, affirmed the decisions below, held that the statute of limitations was tolled, and that the cases of the claimants could go forward.

Thus the Supreme Court of the United States

has set an example that where a plaintiff has not slept on his rights, where the defendant would not be prejudiced by stale lawsuits in that memories have faded and witnesses were no longer available, equitable tolling should be granted in the interest of justice so that the plaintiff could have his day in court with a trial on the merits. The above standard has been followed by one state supreme court after another and it is now time for this Court to place the District of Columbia, which is after all the capitol of the nation, into the column of enlightened jurisdictions. That is exactly what Chief Judge Rogers of the D.C.C.A., in her scholarly and humane Opinion, which is found in the Appendices, asked the full court to do -- without success. This great Court should now grant that great lady jurist her wish by reversing and remanding this case.

CALIFORNIA, OUR LARGEST STATE, HAS ALSO SPOKEN OUT ABOUT HOW EQUITABLE TOLLING PROBLEMS SHOULD BEST BE HANDLED.

ADDISON V. STATE OF CALIFORNIA
578 p. 2D 94 (1978)

An almost parallel case to the present one was found in ADDISON. A case was filed in U.S. District Court, and was dismissed. Then it was filed in the state court where it was dismissed on grounds of statute of limitations. Finally the case was decided in favor of the Plaintiff, which is to say, in favor of equitable tolling of the statute of limitations.

The Supreme Court of California, in finding for the Plaintiff below, wrote:

> " We will apply the well established doctrine of " equitable tolling ". The six month 'limitation period on suits...during the period in which plaintiffs' claims were pending in the federal tribunal, plaintiffs' present action in state court is deemed timely filed.

" It is fundamental that the primary purpose of statutes of limitations is to prevent the assertion of stale claims by plaintiffs who have failed to file their actions until evidence is no longer fresh and witnesses are no longer available. However, courts have adhered to a general policy which favors relieving plaintiff from the bar of a limitations statute when, possessing several legal remedies he, reasonably and in good faith, pursues one designed to lessen the extent of his injuries or damages.....In such a case, defendant can claim no substantial prejudice, having received timely notice of possible tort liability upon filing of the...claim, and having ample opportunity to gather defensive evidence in the event a court action is ultimately filed. Application of

the doctrine of equitable tolling requires timely notice, and lack of prejudice, to the defendant, and reasonable and good faith conduct on the part of the plaintiff. These elements seem present here.....Here, plaintiffs..timely filed their original federal suit within the statutory period. The present state action asserts the same state claims that were raised in the federal suit...." In our view, the balance in this case must be struck in the plaintiff's favor. If the tolling doctrine were not applied, plaintiffs would be denied a hearing on the merits of their claim... Defendants were informed at all times of the nature of Plaintiff's claims. Any delay resulting from plaintiffs' erroneous choice of forum was minimal..The judgment is reversed.."

JUDGE PENN WROTE THAT THIS COURT HAS METED OUT TO THE PETITIONER HERE, " HARSH " JUSTICE, IN REQUIRING HIM TO DISMISS CURTIS' CASE ON GROUNDS OF CARDEN.

The Opinion of Judge Penn, U.S.D.C.D.C., in dismissing the case of Curtis v. Aluminum Association, Inc. and Wolf-Lenkin Limited Partnership, is included in the Appendicies. It clearly lays the blame for Curtis' troubles on the U.S. Supreme Court, in its five to four ruling in CARDEN, and calls it "harsh" justice.

A brief analysis of the practical aspects of this decision may be in order at this very point. While it would be legally proper for this Court to tell Petitioner that he was required to know the law in this case and has no one to blame but himself for his predicament, the fact is that four of the judges who voted against the 5 to 4 opinion apparently were in substantially the same frame of mind as the Petitioner, and if they were not certain as to what the law was, how could the Petitioner guess what the ninth judge on this Court would decide

at some later time after the case had already been filed. If in each of the federal districts only one case was pending against a limited partnership, then perhaps as many as fifty or more case were dismissed on the same grounds as this one, and with the minimum jurisdictional limit of $50,000, perhaps millions of dollars of property was destroyed by these dismissals. Since the issue was therefore considerably in doubt, should the Court have ruled that for cases already pending and for a notice time of (some) days, the CARDEN doctrine would not apply, but thereafter CARDEN would apply? Since one's right to his case is a property right, and since the destruction of property is, shall we say, rated from not good to forbidden, to grounds for litigation, where does the Petitioner stand after loss of at least $75,000 of his property and the expenditure of several thousands of dollars for litigation costs? In return for his taxpayer dollars, such as they are, and his willingness to enlist in the

military in time of war, what has our judicial system given him in return? Is it realistic to expect that a mere lawyer should know more law than four justices of this Court, or Federal Judge Harris? Where by a stroke of a ninth pen the law is " clarified ", is it not realistic for a litigant to expect that provisions be made in the decision to prevent harm to those whose views were the same as four Mr. Justices? While Petitioner can only pray in this case for relief for himself, the larger vision does not escape him. With the words, " harsh " justice, ringing in his ears, the Petitioner utilizes his final remedy in that he brings his case here, back to this Court hoping that the problem can be fixed here, where it began.

"ULTIMATE JUDICIAL RESPONSIBILITY FOR THE SOUND ADMINISTRATION OF JUSTICE IN THE COURTS OF THE DISTRICT OF COLUMBIA, LIES WITH THE SUPREME COURT OF THE UNITED STATES."

"The court of the District of Columbia are still federal courts, and the ultimate responsibility for the sound administration of justice in those courts lies with the Supreme Court", write Stern, Gressman and Shapiro in their authoritative book, Supreme Court Practice: For practice in the Supreme Court of the United States, 6th edition (1986) on page 232. "Accordingly, the Court has taken cases which reflect that responsibility. It has reviewed decisions interpreting and applying statute limited in effect to the District where the interpretations were of great importance to the administration of the laws. See District of Columbia v. Thompson Co., 346 U.S. 100 (1953); District of Columbia v. Murphy, 314 U.S. 441 (1941); District of Columbia v. Pace, 320 U.S. 698 (1944); Loughran v. Loughran, 292 U.S. 216."

SUMMARY AND CONCLUSIONS

Petitioner prays that the foregoing pages demonstrate conclusively that he is an innocent victim of judicial action, if not oversight, which has cost him his property in his case, and thousands of dollars and hundreds of hours of his legal time. All of this, this Court can correct if it agrees that it should.

AS TO THE QUESTIONS PRESENTED, the answer suggested to the FIRST QUESTION is, that justice should take precedence over procedure and that statutes should be construed to do substantial justice, which is to say that the court below should be reversed.

As to the SECOND QUESTION presented, the foregoing pages demonstrate that only under the leadership of this Court can there be reasonable comity of the federal and the state systems in the District of Columbia, as witnessed by the fact that even the Chief Judge of the District of Columbia Court of Appeals has not succeeded

in accomplishing that objective.

As to the THIRD QUESTION, only this Court can decide if it has some obligation to Petitioner. Although he is not to blame for what has occurred he is nonetheless suffering the consequences. While unpredicted intervening judicial acts, may be responsible, there is no question that what has happened to petitioner began with CARDEN, and can be straightened out here. As Judge Penn said in his Memorandum Order dismissing the case, This is " harsh " justice.

As to the FOURTH QUESTION, the answer appears clear that this Court should use its power, control, and leadership to assist the District of Columbia Court of Appeals in getting properly oriented so that it might prevent such noticeable tragedies as this case, join the leaders in state juridical systems such as California, and present a picture to the world of a fair, efficient court system worthy of emulation by others nations. The argument

against the rule of stare decision is found in the opinion of Mr. Chief Justice Rhenquist, in Payne v. Tennessee, U.S.S.Ct. No. 90 - 5721, decided June 27, 1991, "This Court has never felt constrained to follow precedent when governing decisions are unworkable or badly reasoned."..."... the Court has during the past 20 Terms overruled in whole or in part 33 of its previous constitutional decisions," at page 18.

Finally, Petitioner respectfully offers that a rule which states that a decision would go into effect (some) days from the date of the order, and not apply to cases filed prior to that date, would be judicially beneficial even if it embodies problems. Also, alternatively, a " default rule ", which would permit a plaintiff to return to the federal court if the state court refused to take a case on grounds of statutes of limitations, would also be beneficial. Again, the thinking of the great circuit judge in Field v. Volkswagenwerk AG, 626 F.2d 293 (2d Cir. 1980), which would deal with

diversity where there is more than one party, by utilizing the doctrine of ancillary jurisdiction, to which diversity apparently does not apply, i.e., the federal judge would be ordered in such a case to rearrange the parties in such a way as to make the diverse party(ies) ancillary adverse defendant(s) in order that the whole case be tried at one time as between all parties of interest. In this and other ways this great Court can continue to interpret our eighteenth century concept of suits between citizens of different states so as to bring it within the commercial realities of today, when we are less than a decade from the twenty-first century.

RELIEF REQUESTED

Petitioner requests that this Court summarily reverse the District of Columbia Court of Appeals and mandate it to restore this case to the trial calendar, since no more is needed in the form of additional briefs to prove that Petitioner is entitled to his relief.

Alternatively, Petitioner requests that certiorari be granted, and that briefs are next in order; and after that, argument.

Moreover, if this Court agrees with Petitioner, this is a good time to set forth rules which would be designed to prevent a plaintiff from being thrown out of court when he is blameless, but is suffering from a noteworthy opinion by this Court.

Finally, since it appears appropriate to Petitioner at least, this is an opportunity to gently remind the District of Columbia Court of Appeals that it is a high profile court which sits in the capital of this great country and should make itself a model of justice to which

this country can point with great pride.

Respectfully submitted,

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EXHIBIT LISTINGS (APPENDICES)

1. OPINION OF CHIEF JUDGE JUDITH ROGERS, D.C.COURT OF APPEALS, ASSOCIATE JUDGE SCHWELB CONCURRING. PAGES A-1 - A-20.

2. DENIAL OF MOTION FOR REHEARING EN BANC BY D.C. COURT OF APPEALS, CHIEF JUDGE ROGERS AND ASSOCIATE JUDGE SCHWELB VOTING IN FAVOR OF GRANTING SAME. PAGE A-21 - A-22.

3. MEMORANDUM OF JOHN G. PENN, JUDGE, U.S.D.C.D.C., DISMISSING CURTIS V. ALUMINUM ASSOCIATION INC. AND WOLF-LENKIN LIMITED PARTNERSHIP, DEFENDANTS. PAGES A-23 - A-27.

Notice: This opinion is subject to formal revision before publication in the Atlantic and Maryland Reporters. Users are requested to notify the Clerk of the Court of any formal errors so that corrections may be made before the bound volumes go to press.

FILED 4-24-92

District of Columbia

Court of Appeals

DISTRICT OF COLUMBIA COURT OF APPEALS

No. 91-592

ARTHUR S. CURTIS, APPELLANT,

V.

ALUMINUM ASSOCIATION, ET AL., APPELLEES.

Appeal from the Superior Court

of the District of Columbia

(Hon. Curtis E. von Kann, Trial Judge)

(Argued February 20, 1992

Decided April 24, 1992)

Arthur S. Curtis, *pro se*.

Joyce Notarius, with whom *J. Daniel Kuntz* was on the brief, for appellees Aluminum Association, et al.

Kenneth G. Roth for appellee Wolf-Lenkin Limited Partnership.

Before ROGERS, *Chief Judge*, SCHWELB, *Associate Judge*, and BELSON, *Senior Judge*.

Concurring opinion by *Chief Judge* ROGERS, with whom *Associate Judge* SCHWELB joins, at p. 3.

PER CURIAM: The superior Court of the District of Columbia dismissed appellant's suit against Aluminum Association and other defendants on the ground that the three-year statute of limitations governing such actions had expired pursuant to D.C. Code § 12-301 (3). Appellant Curtis concedes that the statute of limitations had run, but urges this court to apply the doctrine of "equitable tolling" and to hold that his earlier suit filed in the United States District Court for the District of Columbia, which asserted the same cause of

action but had been dismissed by that court for lack of subject matter jurisdiction, tolled the statute of limitations for purposes of his Superior Court suit. We affirm.

Mr. Curtis, a member of the Bar who represents himself in this proceeding, seeks relief from alleged water damage to his property alleged to have occurred in February of 1987. He originally filed his action in the United States District Court for the District of Columbia on November 3, 1989. That action, although filed prior to the expiration of the three-year statute of limitations, failed to meet the subject matter jurisdictional requirement of "complete diversity" between all plaintiffs and all defendants. Accordingly, Mr. Curtis' District Court lawsuit was dismissed for lack of subject matter jurisdiction. He subsequently filed a lawsuit in the Superior Court on February 13, 1991, well after the expiration of the three-year statute of limitations.

Mr. Curtis, relying primarily on decisions of other courts, urges this court to hold that equitable tolling excuses him from the statute of limitations of the District of Columbia. We have held, however, that "[t]here is no basis for finding that filing suit in another jurisdiction tolls the statute of limitations here . . . ." *Namerdy v. Generalcar,* 217 A.2d 109, 113 (D.C. 1966); *see also Bond v. Serano,* 566 A.2d 47 (D.C. 1989).

In *Bond,* plaintiff originally filed suit in the United States District Court for the District of Columbia, alleging diversity of citizenship. The District of Columbia, one of several defendants, successfully moved for dismissal of the suit as to it on the grounds for lack of diversity. Plaintiff subsequently filed an identical complaint against the District in the Superior Court of the District of Columbia. The statute of limitations, however, had expired by the time. Plaintiff argued on appeal that the original complaint

filed in federal court tolled the statute of limitations with respect to the Superior Court action. This court upheld the trial court's decision not to apply the doctrine of equitable tolling.

We are unconvinced by appellant's efforts to distinguish the holding in *Bond*. there is no significant distinction between the circumstances presented here. Thus, our holding in *Bond* binds this division.

Affirmed.

ROGERS, *Chief Judge,* with whom Judge Schwelb joins, concurring: Appellant stored personal property in the basement of appellees' building.[1] As the result of a snowstorm in February 1987, water pipes froze and burst in a floor above and flooded the basement, allegedly causing damage to appellant's property. At oral argument, appellant, a Virginia resident, stated

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[1] Appellees are the general landlord, and the tenant of which appellant was a subtenant, both of which have offices in the District of Columbia.

that he filed his lawsuit in federal court after consultation with others because he was likely to receive a trial date in one year, in comparison with the District of Columbia courts where he was unlikely to receive a trial date for three years.

Appellant filed suit in federal court on November 3, 1989. In April 1990, the United States Supreme Court held in *Carden v. Arkoma Assocs.*, 494 U.S. 185 (1990), that citizenship of limited partners must be taken into account in determining diversity of citizenship among parties. A year later the federal suit was dismissed for lack of jurisdiction, because one of appellees' limited partners also was a Virginia resident; the judge noted that the result was "harsh." In denying appellant's motion for reconsideration, the judge also noted, however, that in its order of dismissal it had stated that *Carden*"'is not a new rule, but it is a restatement of the oft-repeated rule that diversity must exist between all members of

a business entity.'" On February 13, 1991, two months before the dismissal of his federal lawsuit, appellant filed suit in the local trial court, anticipating, he claimed in his brief on appeal, the effect of *Carden*. Because the local suit was filed more than three years after his cause of action had accrued, the trial judge dismissed appellant's complaint on March 18, 1991; he also denied a motion to reconsider.

I write separately for the purpose of suggesting again, *see Bond v. Serano*, 566 A.2d 49 (D.C. 1989) ("[t]wo members of this division . . . believe that the issue may be worthy of *en banc* consideration"), that the en banc court should consider whether to adopt the doctrine of equitable tolling as an exception to the statutory limitations bar. Although the cases do not appear to arise often, in the last three years this court has twice been presented with a situation in which a good faith choice of forum by a plaintiff has resulted in the denial of a local forum in the absence of advancement

of the purposes underlying statutes of limitation.

The source of our present rule is *Namerdy v. Generalcar*, 217 A.2d 109 (D.C. 1966), where a plaintiff who could not obtain jurisdiction of the defendant in the foreign courts sought to sue late (after the statute of limitations had run) in the local court to collect four installment payments due. In concluding that suit on collection of the first installment payment under the parties' agreement was barred by the statute of limitations, the court stated that

> [t]here is no basis for finding that filing suit in another jurisdiction tolls the statute of limitations here, and it has been forcibly held that the section of our Code, § 12-205 (as amended Supp. V, 1966, § 12-303), which tolls the statute of limitations while a party is out of the District or when a party absconds or conceals himself, is applicable only to

persons who were District residents at the time the cause of action accrued.

217 A.2d at 113 (citations omitted).[2]

Thereafter, in *Bond v. Serano, supra*, 556 A.2d 47, the court revived *Namerdy*. In *Bond*, the plaintiff in a vehicular collision filed suit against the District of Columbia and other defendants in the federal court in August 1986, two week short of the three-year statute of limitations. In September, the District moved to dismiss on the ground of lack of diversity jurisdiction, and four days later, on September 12, 1986, the plaintiff filed an identical lawsuit in the District of Columbia courts. The District moved to dismiss the local lawsuit on the ground that the statute of limitations had expired on August 27, 1986, 16 days before suit was filed.

Meanwhile, in January 1987, the federal

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[2] The plaintiff in *Namerdy* was still able to collect on all except the first installment payment under the parties' agreement. 217 A.2d at 113.

district court judge had ruled that pendent party jurisdiction over the District of Columbia was proper. However, on June 5, 1987, the U.S. Court of Appeals for the District of Columbia Circuit held, in an unrelated case, that federal courts may not excise such jurisdiction over the District of Columbia in a diversity case. *Long v. District of Columbia,* 261 U.S. App. D.C. 1, 820 F.2d 409 (1987). Thereafter, the federal lawsuit against the District of Columbia was dismissed, leaving intact the lawsuit against the other individual defendants, and the District renewed its motion to dismiss the local lawsuit. *Bond v. Serano, supra,* 566 A.2d at 48.

This court affirmed the trial court's rejection of the position that the pendency of the federal action filed in reasonable ("though in hindsight mistaken") belief tolled the statute of limitations. *Id.* at 49. In so doing the court noted that the trial judge had found the plaintiff's position:

to have 'considerable intuitive appeal'

> because District of Columbia law favors resolving claims on the merits, and because the District government had conceded that the primary purposes underlying statutes of limitation -- evidence -- were not immediately implicated in this case. The court concluded, nevertheless, that 'basic considerations . . . militate against creating a new exception to the statute of limitations.'

Id. at 48. The trial judge noted that this court had not created a general equitable exception to the statute of limitations and such exceptions as it had adopted were narrow. *Id.* This court thereafter rejected Bond's request to hold that

> equitable tolling may relieve a plaintiff of the consequences of failure to comply with the statute of limitations where: (a) the original suit filed, although dismissed without prejudice, gave timely

notice to the defendant of the plaintiff's cause of action; (b) there was no prejudice to the defendant in gathering evidence to defend against the second claim; and (c) plaintiff acted reasonably and in good faith in prosecuting the first action and diligently in filing the second.

Id. at 49. The court determined that in *Namerdy v. Generalcar, supra,* 217 A.2d 109, the court had "rejected a contention not materially distinguishable . . . ." *Id.*

The instant case is perhaps more troubling than either *Namerdy v. Generalcar* or *Bond v. Serano* because appellant is being denied any opportunity to recover against anyone. Unlike the plaintiff in *Namerdy*, appellant does not have a divisible claim. There also are no other defendants that appellant can sue, as there were in *Bond v. Serano, supra,* 566 A.2d at 53 (Farrell, J., concurring) (three defendants remained subject to suit in federal court).

Furthermore, this is not a case in which the plaintiff can be faulted for not having located the defendants before the statute of limitations had run, as in *Namerdy v. Generalcar, supra,* 217 A.2d at 111. Although it might be suggested that appellant may have taken a chance on filing in the federal court in view of long-standing law requiring total diversity, there is nothing to indicate that he knew there was such a risk or that there was a limited partner among appellees who would defeat diversity jurisdiction.[3] *Bond v. Serano, supra,* 566 A.2d

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[3] The law at the time was apparently in conflict among the federal circuits. By "MEMO" filed in the trial court, appellant stated that at the time he filed his complaint in the federal court, the controlling law was found in *Gordon-Maizel Constr. Co., Inc. v. LeRoy Prods., Inc.,* 643 F. Supp. 188, 189 (D.D.C. 1986) (following the Second Circuit Court of Appeals in holding that a limited partner is not a proper party to a proceeding and hence not to be considered in determination of diversity. *See Colonial Realty Corp. v. Bache & Co.,* 358 F.2d 178, 183-184 (2d Cir.), *cert. denied,* 385 U.S. 817 (1966)). *But see Conroy v. Winn,* 581 F. Supp. 1280 (D.D.C. 1984) (where no complete diversity of citizenship among limited partners, federal court does not have diversity jurisdiction) (relying on *Carlsberg Resources*

(continued...)

at 53 (Farrell, J., concurring) (noting that the plaintiff sought "to be relieved of the consequences of his mistake" in thinking he could obtain pendant jurisdiction over the District of Columbia in a diversity action in federal court). Nor does this appear to be a case in which the defendants sought dismissal of the federal lawsuit on jurisdictional grounds.[4]

Our current rule means that, contrary to the usual concern about judicial economy, much less making the courts available and avoiding unnecessary litigation and litigation cost, a plaintiff must file in all possible fora in order to avoid a later limitations bar as the result, at least in part, of an intervening

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[3](...continued)
Corp. v. Cambria Savings and Loan Ass'n, 554 F.2d 1254, 1258-59 (3d Cir. 1977). *See also* note 4, *infra*.

[4] In a "MEMO" filed with his complaint, appellant states that it was the federal district court judge who first raised concern about jurisdiction, referring to *Carden, supra*, 494 U.S. 185. Depositions followed in order to determine the citizenship of all general and limited partners of appellees.

appellate determination making the favored forum no longer available. This is, arguably, consistent with the general (and old) rule that where a plaintiff mistakes his remedy, the remedy is barred in the absence of a savings statute if time runs and his action is nonsuited or dismissed. *Bond v. Serano, supra,* 566 A.2d at 51, (citing *Willard v. Wood,* 164 U.S. 502, 523 (1896)). It is premised on the view that it is for the legislature to determine that an equitable tolling exception to the statute on limitations shall apply. *Id.* at 50, 52-53 (citing two decisions of the U.S. Court of Appeals for the D.C. Circuit, one noting that the legislature had not enacted an exception). While I agree that the legislature can enact such an exception, I do not agree that adoption by the court of any equitable tolling doctrine would be "an impermissible inroad on the legislature's authority . . . ." *See id.* at 54 & 49 n.3 (cases cited from other jurisdictions adopting equitable tolling doctrine); *see also*

Galligan v. Westfield Centre Service, Inc., 82 N.J. 188, 412 A.2d 122, 124 (1980) ("harshness and lack of definitional clarity have led courts to develop a common law of limitations" (citing, at 124-125, decisions by the United States Supreme Court and the California and Michigan courts)).

This court has not heretofore viewed itself powerless where the underlying issue was the denial of access to our courts. Thus, in *Bussineau v. president and Directors of Georgetown College,* 518 A.2d 423 (D.C. 1986), by defining when a cause of action arose, the court effectively adopted an exception to the statutory limitations bar. *See Ehrenhaft v. Price,* 483 A.2d 1192, 1201, 1202 (D.C. 1984) (extending application of the discovery rule to tort and contract claims in order to avoid time bar to suit); *see also Hornblower v. George Washington University,* 31 App. D.C. 64 (1908) (lulling doctrine). While "[s]tatutes of limitation are not simply technicalities," *Bond*

v. Serano, supra, 566 A.2d at 50 (Farrell, J., concurring), they exist for a purpose, which is to "'protect defendants and the courts from having to deal with cases in which the search for truth may be seriously impaired by the loss of evidence, whether by death or disappearance of witnesses, fading memories, disappearance of documents, or otherwise.'" *Ehrenhaft v. Price, supra,* 483 A.2d at 1202 (quoting *United States v. Kubrick,* 444 U.S. 111, 117 (1979)). This court has recognized, too, that "limitations periods 'find their justification in necessity and convenience rather than logic . . . . Their shelter has never been regarded as what now is called a 'fundamental' right or what used to be called a 'natural' right of the individuals.'" *Id.* (quoting *Chase Securities Corp. v. Donaldson,* 325 U.S. 304, 314 (1945)). Accordingly, upon balancing the interests at issue, *see Burns v. Bell,* 409 A.2d 614, 616 (D.C. 1979) (magnitude of injury and plaintiff's interest in relief against potential prejudice

to defendant to be free from stale claims), the court has acknowledged, notwithstanding legislative silence, that the statutory limitations bar must give way in some circumstances where the purposes of the limitations bar are not advanced. Whether we construe the exceptions to the limitations bar narrowly or generously is, of course, an entirely different question.

The fundamental question of whether access to our courts should be denied to a plaintiff who makes a good faith choice of a forum in originally filing suit in federal court, and who will be without access to any judicial relief despite the absence of any showing of prejudice to the defendant, is worthy of consideration by this court sitting en banc. *See* D.C. App. R. 40 (e). The en banc court should consider what purpose is served by an unyielding limitations rule that "would at times inflict obvious and unnecessary harm upon individual plaintiffs without advancing the legislative purposes" of

statutes of limitation. *Galligan v. Westfield Centre Service, Inc., supra,* 82 N.J. at __, 412 A.2d at 124. While there are arguments to be made against adoption of an equitable tolling doctrine, *see e.g., Bond v. Serano, supra,* 566 A.2d at 49 (Farrell, J., concurring), mere avoidance of judicial analysis of the equities, *see id.* at 53, does not, on balance, seem a weighty obstacle. *Cf. id.* at 54 (citing *Galligan v. Westfield Centre Service, Inc., supra,* 82 N.J. at __, 412 A.2d at 124 (equitable tolling for plaintiff error is "[a] 'just accommodation' of individual justice and public policy requires that 'in each case the equitable claims of opposing parties must be identified, evaluated and weighed'" (citation omitted))). Any suggestion that the legislature has made an affirmative determination not to allow a further exception to the limitations bar out of concern that the right to litigate is only a privilege, *see id.* at 54, appears without foundation, even if the en banc court should determine, for other

reasons, not to adopt the equitable tolling doctrine.

DISTRICT OF COLUMBIA

COURT OF APPEALS

FILED AUG 5 1992

No. 91-CV-592

District of Columbia

Court of Appeals

ARTHUR S. CURTIS,

Appellant,

CA1912-91

V.

ALUMINUM ASSOCIATION, ET AL.,

Appellees.

BEFORE: *Rogers, Chief Judge; Ferren, Terry, Steadman, *Schwelb, Farrell, Wagner, King, and Sullivan, Associate Judges; and *Belson, Senior Judge.

O R D E R

On consideration of appellant's petition for rehearing or rehearing en banc, the oppositions thereto, and the motion of appellant to supplement the petition, it is

ORDERED by the merits division* that the petition for rehearing is denied. It is

FUTHER ORDERED that the motion to supplement is granted and the Clerk is directed to file the lodged supplement to the petition; and it appearing that the majority of the judges of this court has voted to deny the petition for rehearing en banc, it is

FUTHER ORDERED that the petition for rehearing en banc is denied.

PER CURIAM

Chief Judge Rogers and Associate Judge Schwelb voted to grant rehearing en banc.

UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF COLUMBIA

ARTHUR S. CURTIS,

Plaintiff,

v. Civil Action No. 89-3032

WOLF-LENKIN LTD. PARTNERSHIP, et al,

Defendants.

FILED

APR 10 1991

CLERK, U.S. DISTRICT COURT

DISTRICT OF COLUMBIA

MEMORANDUM

Plaintiff filed the present action against defendants Wolf-Lenkin Ltd. Partnership ("Wolf-Lenkin") and The Aluminum Association, Inc. ("AAI") on November 3, 1989. Plaintiff asserted that this Court had jurisdiction based on diversity. Plaintiff is a citizen of Virginia and defendants have their principal places of business in the District of Columbia.[1] See

[1] Defendant Wolf-Lenkin is a limited partnership duly formed under the Uniform Limited Partnership Act of the District of Columbia.

Complaint at 1.

It is well established that a court must determine whether it has diversity jurisdiction at the outset of any action. Davis v. Licari, 434 F. Supp. 23 (D.D.C. 1977). Recently in Carden v. Arkoma Associates, 110 S. Ct. 1015 (1990), the Supreme Court held "[i]n sum, we reject the contention that to determine, for diversity purposes, the citizenship of less that all of the entity's members. We adhere to our oft-repeated rule that diversity jurisdiction in a suit by or against the entity depends on the citizenship of "all the members," citing Great Southern Fire Proof Hotel Co. v. Jones, 177 U.S. 449, 456 (1900) (emphasis added). Thus, a limited partnership is not a citizen for diversity purposes. The rule articulated in Carden that complete diversity must exist between all of the limited partnership's partners, both general and limited is not a new rule, but is a restatement of the oft-repeated rule that diversity must exist between all

members of a business entity.

Therefore, to determine whether the Court has jurisdiction, the Court required that on or before November 29, 1990, defendant Wolf-Lenkin file an affidavit of citizenship of its partners, both general and limited. See Order November 21, 1990. Plaintiff objected to the use of the affidavit and requested that plaintiff be able to depose Melvin Lenkin on this issue. The Court agreed and allowed plaintiff to depose Melvin Lenkin solely on the issue of the citizenship of the partners, general and limited. See Order December 18, 1990.[1]

On March 28, 1991, defendants filed a affidavit from Wolf-Lenkin limited partner Judith P. Goodrow ("Goodrow"). The affidavit stated that Goodrow has been a limited partner

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[1] The Court notes that because of disagreement of the parties the Court had to become involved in the scheduling of the deposition. To that end the Court ordered that the deposition would be held in the Courthouse on March 14, 1991. See Order February 28, 1991.

since 1986 and that she has lived in McLean, Virginia, continuously since 1984. In addition, Goodrow states that she has been registered to vote and has paid taxes in Fairfax, Virginia, since 1984. See Affidavit of Judith P. Goodrow. Plaintiff opposes the use of the affidavit of Goodrow because defendant Wolf-Lenkin opposed the deposition of Goodrow. See Plaintiff's Filing of March 29, 1991. While the plaintiff may want to depose Goodrow, the Court sees no basis for disregarding the affidavit of Goodrow. Therefore, the Court will consider the affidavit of Goodrow in addressing whether the Court has jurisdiction.

It is a basic rule that jurisdiction by diversity is conferred on a federal court only when each defendant is a citizen of a different state from each plaintiff. See generally Dolch v. United California Bank, 702 F.2d 178 (9th Cir 1983); and Field v. Volkswagenwerk AG, 626 F.2d 293 (2d Cir. 1980). In the present action, plaintiff and a limited partner of Wolf-Lenkin

are citizens of Virginia. Because there is not complete diversity of citizenship between plaintiff and all defendants, the Court lacks subject matter jurisdiction and the case must therefore be dismissed. While the Court recognizes that this is a harsh result, the Court cannot entertain a case over which it lacks jurisdiction.

As for the motions that have been filed in this case, the Court cannot address them since the Court lacks jurisdiction in this action.

An appropriate Order accompanies this Memorandum.

Date: APR 10 1991

signed by John Garret Penn

JOHN GARRETT PENN
United States District Judge